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No. 95-1131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ERNEST JONES, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the administrative suspension of a motorist's driver's license pose no double jeopardy bar to subsequent prosecution of the motorist for the crime of driving while intoxicated?

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STATE OF MARYLAND,

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On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner Ernest Jones, Jr.

OPINIONS BELOW

The reported opinion of the Court below, *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1a-35a).

The one-paragraph opinion of the Circuit Court for Montgomery County, Maryland, granting Petitioner's motion to dismiss, is reproduced in the Statement of the Case, *infra* at 3.

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the petition for writ of certiorari.

STATEMENT OF THE CASE

On April 25, 1994, Petitioner Ernest Jones, Jr. was arrested on the charge of driving while intoxicated. (Pet. for Cert. App. 2a). He later consented to a breath test to determine his blood alcohol concentration (BAC), which showed his BAC to be .27. (*Id.*).

On August 31, 1994, an administrative law judge suspended Jones's license for 30 days, pursuant to Md. Code Ann., Transp. § 16-205.1 (1992 & Supp. 1994). (Pet. for Cert. App. 2a). On November 15, 1994, Jones was tried before the District Court of Maryland for Montgomery County. (Pet. for Cert. App. 3a). That court found Jones guilty of driving while intoxicated. (*Id.*).

On appeal to the Circuit Court for Montgomery County, Jones filed a motion to dismiss the prosecution, contending that double jeopardy principles precluded the

State's prosecuting him for the crime of driving while intoxicated following the administrative suspension of his driver's license. (*Id.*). After a hearing on the motion, the circuit court granted Jones's motion over the State's objection and dismissed the case. (*Id.*). The court ruled:

> Well, this comes at -- I have not had the opportunity obviously to sit and digest all of this. I think I know sufficiently about it just having read the authorities that you are talking about to know what the issue is, because I think it turns on something on which I have an idee fixe anyway and that is the question of punishment vel non for taking away a person's driver's license.
>
> You just happened to hit -- I do not know what other judges think about it. Maybe others do not have as strong a stance as I do.
>
> But in my view you are punishing somebody by taking away their driver's license for whatever length of period of time and therefore the motion is granted.

The State of Maryland petitioned the Court of Appeals of Maryland for issuance of a writ of certiorari to review the judgment of the circuit court. That court granted the petition and reversed the lower court's judgment. Guided by this Court's decisions of *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court of Appeals found no double jeopardy bar to the State's prosecuting Petitioner for the criminal charge of driving while intoxicated. (Pet. for Cert. App. 13a-34a). The court examined the statute in Maryland that provides for suspension of a driver's license when the driver either refuses to take a breath test

to determine the driver's blood alcohol concentration, or takes the test and fails it. (*Id.* 19a-28a). The court concluded that the statute is both remedial, in that it reflects the public welfare purpose of quickly removing drunk drivers from the roads, and punitive, in that it serves the goal of deterring future offenders. (*Id.* 30a). The court determined, however, that the sanction of a 30-day suspension of a driver's license is rationally related to the statute's remedial purpose. (*Id.* 31a-33a). Given that administrative license suspension does not meet the *Halper* test for punishment, the court concluded that there is no double jeopardy bar to the State's prosecution of Jones on the criminal charge of driving while intoxicated and remanded the case for trial on that charge. (*Id.* 33a-35a).

REASONS FOR DENYING THE WRIT

The issue presented in the instant petition—whether a 30-day administrative suspension of a driver's license is "punishment" that erects a double jeopardy bar to subsequent criminal prosecution for the same offense—is unworthy of certiorari review for any of three reasons: First, this Court has recently denied a petition for writ of certiorari presenting the identical issue. Second, the Maryland Court of Appeals correctly applied this Court's double jeopardy precedent to conclude that administrative license suspension is not punishment for double jeopardy purposes. Third, virtually every court that has decided this issue is in accord with the decision of this case. There is, then, no conflict among the lower courts requiring resolution by this Court.

I.

THIS COURT HAS RECENTLY DENIED REVIEW ON THE EXACT ISSUE RAISED BY THIS PETITION.

Just three weeks ago, this Court refused to grant certiorari review on precisely the issue raised by the instant petition. *See Cossey v. Louisiana*, (La. Ct. App. 3d Cir. May 4, 1995), *cert. denied*, 64 U.S.L.W. 3498 (U.S. Jan. 22, 1996) (No. 95-822). Petitioner presents no arguments that suggest his petition should be decided any differently. Moreover, ten days before denying review in *Cossey*, this Court granted review in two cases that present the related question whether civil forfeiture of property involved in illegal drug activity is punishment for double jeopardy purposes. *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 12, 1996) (No. 95-345); *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 12, 1996) (No. 95-346). However confused the lower federal and state courts might be with respect to the issues presented by *Ursery* and *$405,089.23*, there is no confusion among the lower courts in deciding the far easier question of the double jeopardy implications of administrative license suspensions. See part III, *infra*.

II.

THE COURT OF APPEALS OF MARYLAND CORRECTLY APPLIED THIS COURT'S DOUBLE JEOPARDY PRECEDENT.

In *United States v. Halper*, 490 U.S. 435, 440 (1989), this Court held that a civil sanction, notwithstanding its label as "civil," may nonetheless constitute punishment for double jeopardy purposes. Whether a sanction is punishment for double jeopardy purposes can only be determined by "assessing the character of the actual sanctions imposed on the individual by the machinery of the State." *Id.* at 447. In *Halper*, this Court set forth the test for determining if a civil sanction constitutes punishment for double jeopardy purposes:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

Id. at 448-49 (emphasis added). The Court emphasized that the determination of whether a sanction is punishment insofar as double jeopardy is concerned focuses on the purpose of the sanction, not on its incidental effect upon the defendant. On this point this Court stated: "This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment." 490 U.S. at 477 n.7. The Court cautioned

that only rarely would a civil sanction be deemed punishment under its tests, saying: "What we announce now is a rule for the *rare case*, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449 (emphasis supplied).

Two years ago, in *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), the Court was confronted with the question whether the Double Jeopardy Clause was violated by Montana's attempt to collect a tax on illegal drugs following a criminal conviction for possession of those drugs. The Court found the *Halper* test unworkable for determining whether a *tax*, as opposed to some other form of civil sanction, constituted punishment for double jeopardy purposes: "[Revenue generating] tax statutes serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* at 1948 (internal quotation marks and citation omitted). Nothing in *Kurth Ranch*, however, altered the basic tenet that no civil sanction, whether it be a forfeiture, fine, or tax, will be deemed punishment for double jeopardy purpose unless "the clearest proof" demonstrates that it has lost its remedial or revenue-generating characteristics and become *solely* punitive in "purpose and effect." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984).

The Court of Appeals of Maryland looked to *Halper* and *Kurth Ranch*, as well as the Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), as informing the double jeopardy analysis, and determined that the 30-day

suspension of a driver's license is not punishment. The Court examined the statute that provides for this administrative sanction—Maryland's so-called "implied consent law"—and concluded that one of its goals was remedial, *i.e.*, to remove drunk drivers from the highways. (Pet. for Cert. App. 30a). This conclusion not only squares with the statute's language and history, but is consistent with this Court's comments regarding a similar statute. *See Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (upholding, as against a due process challenge, a Massachusetts statute that mandates suspension of a driver's license for refusal to take a breath analysis test, and pointing out that the Commonwealth's interest in public safety is substantially served by, among other things, promptly removing drunk drivers from the road). The Court of Appeals of Maryland did note that the statute also has the purpose of deterring drunk drivers, but found that the sanction of license suspension is rationally related to the statute's remedial purpose. From this, it was a simple step for the court to hold that, under *Halper*, license suspension is nonpunitive and thus poses no double jeopardy bar to criminal prosecution.

This result is no doubt correct and in complete accord with the Court's cases. No further examination of the issue is warranted.

III.

THE LOWER COURTS ARE VIRTUALLY UNANIMOUS IN HOLDING THAT ADMINISTRATIVE SUSPENSION OF A DRIVER'S LICENSE IS NOT PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES.

Numerous lower courts have had recent occasion to address the issue presented by this petition. With but a single exception—one intermediate appellate court in Ohio—every court has concluded that administrative suspension of a driver's license is not punishment, as that term is used in double jeopardy parlance.

As did the Maryland Court of Appeals in this case, these courts reason that statutory schemes providing for license suspension or revocation as the result of refusing to take or failing a blood alcohol test are primarily remedial, and that the sanction is both rationally related and not overwhelmingly disproportionate to the government's public safety interest. *See, e.g., State v. Nichols*, 819 P.2d 995, 998-1000 (Ariz. App. 1991) (applying *Halper* test and concluding that administrative suspension of driver's license, even if incidentally punitive, is not punishment for double jeopardy purposes and does not bar State from prosecuting driver for drunken driving); *State v. Murray*, 644 So. 2d 533, 535 (Fla. App. 1994) (finding no double jeopardy violation in criminal prosecution following administrative suspension of license; purpose of suspension is regulatory, not punitive); *Butler v. Dept. of Public Safety and Corrections*, 609 So. 2d 790, 795-96 (La. 1992) (holding that "license suspension is a remedial measure which attempts to

protect society from the hazards posed by drunk drivers by removing [their] driving privileges."); *State v. Strong*, 605 A.2d 510, 513 (Vt. 1992) (holding that an administrative license suspension has a rational remedial purpose of protecting public safety). *Accord State v. Maze*, 825 P.2d 1169 (Kan. App. 1992); *Transportation Cabinet v. Feige*, 889 S.W.2d 52 (Ky. App. 1994); *Rushworth v. Registrar of Motor Vehicles*, 596 N.E.2d 340 (Mass. 1992).

Virtually every appellate court to decide this issue since *Kurth Ranch* has rejected any suggestion that it changed the *Halper* double jeopardy analysis for non-tax sanctions. *See, e.g., Snow v. Superior Court of Arizona*, 903 P.2d 628, 634 (Ariz. App. 1995) (declaring that *Halper* test remains unchanged by *Kurth Ranch*, and reaffirming that double jeopardy is not violated by prosecuting defendant on drunk driving charge); *Davidson v. Mackinson*, 656 So. 2d 223, 224-25 (Fla. App. 1995) (finding no double jeopardy bar to prosecution following administrative revocation of driver's license, and commenting that, although loss of license may be painful, primary purpose of administrative sanction is to promote public safety); *Jackson v. State*, 462 S.E.2d 802, 803 (Ga. App. 1995) (administrative license suspension is reasonably related and not disproportionate to State's remedial purpose); *State v. Higa*, 897 P.2d 928, 933-34 (Haw. 1995) (applying "broader principles of *Halper*" to conclude that license revocation proceedings "serve legitimate, nonpunitive, and purely remedial functions"); *State v. Savard*, 659 A.2d 1265, 1267-68 (Me. 1995) (applying *Halper* to conclude that license suspension is not punishment); *Luk v. Commonwealth*, 658 N.E.2d 664, 668-73 (Mass. 1995) (same); *State v. Hanson*, 532 N.W.2d 598, 602 (Minn. 1995) (rejecting the defense claim that *Austin* and *Kurth*

Ranch changed *Halper* test, and holding that, under *Halper*, administrative license revocation is remedial because it "is certainly not 'overwhelmingly disproportionate' to the public safety interest at stake."); *State v. Cassady*, 662 A.2d 955, 958 (N.H. 1995) (license revocation not punishment for double jeopardy purposes); *State v. Zimmerman*, 539 N.W.2d 49, 55-56 (N.D. 1995) (same); *State v. Miller*, No. 2-94-32, 1995 WL 275770 at *2-3 (Ohio App. May 12, 1995) (unpublished) (citing both *Halper* and *Kurth Ranch* and holding that administrative license suspension is remedial in nature and does not constitute punishment under the Double Jeopardy Clause); *Tench v. Commonwealth*, 462 S.E.2d 922, 924-25 (Va. App. 1995) (same). *See also State v. Zerkel*, 900 P.2d 744, 758 (Alaska App. 1995) (rejecting *Halper* analysis, but, in applying *Austin* and *Kurth Ranch*, holding that Alaska's administrative license suspension scheme is not punishment for double jeopardy purposes).[1]

In short, the lower courts are not remotely in conflict on this issue, but—almost to the last—have had no difficulty applying this Court's precedent on the subject.

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[1] The only decision that reaches the contrary conclusion comes from the intermediate appellate court of the Seventh District of Ohio, *State v. Gustafson*, No. 94 C.A. 232, 1995 WL 387619 (Ohio App. June 27, 1995) (unpublished). The court there, relying in part on an Arizona municipal court decision which has since been effectively overruled by the Arizona Court of Appeals decision in *Snow v. Superior Court of Arizona*, cited *supra*, concluded that an administrative suspension of a driver's license is punishment that bars a subsequent criminal prosecution on charges based on the same act. *State v. Miller*, cited *supra*, is from the Third District of Ohio, and reaches the opposite conclusion.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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February 16, 1996